Supreme Court, U.S.
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No. 99-1074

In The

Supreme Court of the United States

LOUISE ROBICHAUD SAMAROO,

Petitioner,

v.

AT&T MANAGEMENT PENSION PLAN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE ISSUE PRESENTED

Did the Third Circuit correctly apply ERISA, as modified by the Retirement Equity Act, in ruling that Petitioner's Amended Judgment of Divorce, issued by a New Jersey state court in 1996 as a purported amendment to a 1984 divorce judgment, was not a Qualified Domestic Relations Order, and was therefore preempted by ERISA, because it required the pension plan to "provide increased benefits" contrary to 29 U.S.C. §1056(d)(3)(D)(ii), by seeking to retroactively designate Petitioner a "surviving spouse" under her ex-husband's pension plan twelve years after his death, where Petitioner had not been so designated in the original Judgment and was not entitled to any payments from the pension plan as of the actual date of her ex-husband's death?

LIST OF PARTIES

The AT&T Management Pension Plan is an employee welfare and pension plan covered by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1001 *et seq.* AT&T Corp. is the Plan's sponsor.

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COUNTERSTATEMENT OF THE CASE AND FACTS

This case has a long history and a convoluted set of facts. It exemplifies the "shoemaker's children" parable, because Petitioner, a matrimonial attorney appearing *pro se*, sat on her rights during an almost three-year period when she could have secured the order that would have guaranteed her the relief she now belatedly seeks. Her situation is all but unique throughout the country. In the 15 years since the enactment of the relevant statute, there are only three other recorded instances of an analogous fact pattern: One occurred in a case that resulted in an unpublished district court opinion, and the other two in state court decisions consistent with the Third Circuit's ruling below. And, as explained *infra*, Petitioner's situation will most definitely be unique in the state of New Jersey, where this case arose, because that state's Appellate Division has ruled, after the state trial court's action in this case, that a New Jersey divorce judgment may not henceforth be retroactively modified after the death of one of the parties in such a manner as was done here. For these and other reasons, certiorari should be denied.

The dispute between the litigants here began 12 years ago, in 1988, when the AT&T Management Pension Plan ("MPP" or the "Plan"), an employee welfare and pension benefit plan governed by the Employee Retirement Income Security Act, 29 U.S.C. §1001 *et seq.* ("ERISA"), denied a claim by petitioner Louise M. Robichaud ("Petitioner" or "Robichaud") for Plan benefits. Robichaud had been married to Winston R. Samaroo ("Samaroo"), a participant in the MPP by virtue of his employment by various companies owned by AT&T Corp. ("AT&T"). Robichaud and Samaroo had separated in 1983 and

divorced in 1984. A Final Judgment of Divorce (generally, the "Judgment") dissolving the Samaroos' marriage was entered by a New Jersey state court on October 25, 1984. That Judgment incorporated the terms of an agreement relating to property and other assets that Robichaud and Samaroo had executed on March 30, 1983 (the "Property Settlement Agreement" or "PSA"). At both the PSA and Judgment stages, Samaroo had been represented by counsel. Robichaud, a licensed attorney with a matrimonial law practice, had not retained counsel, choosing instead to represent herself.

In addressing the division of Samaroo's pension entitlement with Petitioner, the Property Settlement Agreement did not require Samaroo to designate Petitioner as his surviving spouse or otherwise commit him to do anything other than pay his ex-wife half of what the parties believed his AT&T pension was worth at the time – an amount equal to $679.29 per month. Payments were to begin "at the time of [Samaroo's] retirement and receipt of his pension," and to continue for so long as he received it. Survivorship issues were addressed elsewhere in the PSA, where Samaroo obligated himself to continue to carry the supplemental life insurance offered to employees by AT&T and "irrevocably assigned" the policy to Robichaud. A section of the PSA entitled "Waiver of Property Rights" contained a mutual waiver and release of all claims by each party against the property of the other except as expressly set forth in the PSA.

In August 1984, two months before entry of the Judgment, Congress passed the Retirement Equity Act of 1984, Pub. L. No. 98-397 ("REA"), which became effective January 1, 1985. REA amended ERISA's provision that benefits

under pension plans "may not be assigned or alienated," 29 U.S.C. §1056(d)(1). In relevant part, the amendment specified a single narrow exception to the anti-alienation requirement: A spouse of a participant in an ERISA-governed pension plan who divorces that participant may become an "alternate payee" of the pension plan by obtaining a state court domestic relations order ("DRO") that meets certain enumerated requirements and thereby becomes a "Qualified Domestic Relations Order" ("QDRO"). 29 U.S.C. §1056(d)(3)(A). REA also amended ERISA to provide explicitly that if a DRO did not qualify as a QDRO, it was preempted and could not be enforced against a pension plan. 29 U.S.C. §1144(b)(7).

A QDRO "creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to receive, all or a portion of the benefits payable with respect to a participant under a [pension] plan." 29 U.S.C. §1056(d)(3)(B)(i)(I). It can relate to child support, alimony payments or marital property rights, and orders a pension plan to pay directly to the non-participant spouse or former spouse a portion of the pension benefits for which the participant is eligible or will become eligible.

REA provides that a DRO cannot be considered a QDRO, and will be preempted and unenforceable, unless it meets seven criteria. The first four, which are administrative and set forth in §1056(d)(3)(C), require a state court DRO to specify:

> (i) the name and last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,

(ii) the amount or percentage of the participant's benefits to be paid by the plan to each alternate payee, or the manner in which such amount or percentage is to be determined,

(iii) the number of payments or period to which such order applies, and

(iv) each plan to which such order applies.

The remaining criteria are contained in §1056(d)(3)(D) and set forth three substantive things that a DRO must *not* do if it is to escape preemption and be enforceable against a pension plan as a QDRO:

A domestic relations order meets the requirements of this subparagraph only if such order –

(i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan;

(ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and

(iii) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

It is this section – and specifically subparagraph (ii) – which is the focus of this case.

REA did not specifically address whether its amendment of ERISA establishing the concept of a QDRO was to have retroactive effect as to state court DROs issued prior to its effective date of January 1, 1985, like Petitioner's October 25, 1984 Judgment. The Senate Report

regarding REA noted that the provisions of the new law "generally apply on January 1, 1985" and that if a pension plan had already been paying a non-participant under a DRO entered prior to January 1, 1985, it was to continue to do so. On the other hand, if it had not been paying a non-participant under a pre-1985 DRO, as was the case with Petitioner's Judgment, a pension plan was to have discretion to decline to treat such a DRO as a QDRO. S. Rep. No. 575 at 23 (1984).

Despite the fact that, as a practicing attorney in the field, Robichaud had to be familiar with the passage of REA in order to competently represent her clients, she took no action to amend her pre-REA Judgment to a QDRO during the 39 months her ex-husband survived after REA was enacted. During the proceedings below, Robichaud explained under oath why she had not acted to obtain a QDRO before her ex-husband died, confirming that what is involved here is a "mistake" in the dictionary but not in the legal sense of the word: "[N]o one anticipated that Samaroo would die prior to retirement age. . . . Neither Winston (nor his attorney) or I thought about the survivor rights to this pension. . . . [I simply] did not consider this issue in drafting the [Property Settlement] agreement." Thus, there was no "mutual mistake" as between Samaroo and Petitioner.[1] Petitioner just made the mistake of failing to protect her rights, which came back to haunt her on September 20, 1987,

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[1] *See Roth v. Roth*, 506 N.W.2d 900, 903 (Mich. Ct. App. 1993) (divorcing wife, who was not an attorney, "charged with the knowledge that the mortality tables showed [her ex-spouse] was likely to predecease her.")

when her ex-husband, who had not remarried, died while still actively employed by AT&T.

As a participant in the MPP, Samaroo could, while living, have qualified for one of two basic types of pension – a "Service Pension" or a "Deferred Vested Pension" – depending on the number of years of service with AT&T he had accumulated, and his age. Participants were eligible for a Service Pension if they had accumulated: (a) 30 or more years of service, irrespective of age; or (b) 25 or more years of service and had attained the age of 50; or (c) 20 or more years of service and had attained the age of 55; or (d) 10 or more years of service and had attained the age of 65. Participants were eligible for a Deferred Vested Pension if they had accumulated 10 or more years of service but were *not* eligible for a Service Pension.

Samaroo was 53 when he died and had 22 years, one month and seven days of service with AT&T. Thus, he was eligible *only* for a Deferred Vested Pension and *not* a Service Pension.

The key difference between a Service Pension and a Deferred Vested Pension was in terms of when a participant could begin collecting benefits. While both pensions provided benefits that would last for the participant's lifetime, those eligible for a Service Pension could retire and elect to receive payments immediately, although benefits would be actuarially reduced in an amount determined from actuarial tables, depending on the number of years before age 55 at which the participant retired. Those participants eligible for Deferred Vested Pensions could not begin to receive payments until their sixty-fifth birthday, unless the participant had accumulated 20 or

more years of service, in which case he/she could elect to begin receiving an actuarially reduced Deferred Vested Pension at age 55. Thus, if Samaroo had not died and had terminated his employment with AT&T the day before his death, he would have received no pension payments from the Plan until age 65 (because he had more than 20 years of service), unless he elected to receive actuarially reduced benefits at age 55 (which he could do because he had more than 20 years service); in this latter case, his benefit would have been reduced by approximately 60%. The bottom line is that at the time of Samaroo's death, because the Judgment only required him to pay Petitioner $679.29 per month when (and for so long as) he received pension payments from the MPP, Petitioner was left with a Judgment that granted her half of monthly pension payments that could never become payable under the terms of the Plan.

The MPP did provide a lifetime annuity to a *surviving spouse* of a participant who, like Samaroo, had qualified for a Deferred Vested Pension but died before retirement while still actively employed. This Automatic Survivor Annuity would commence immediately upon the participant's death if the participant, like Samaroo, had accumulated 15 or more years of service as of the date of death. But because this provision applied only if the participant left a "surviving spouse" at the time of his death, and Samaroo had long since been divorced from Petitioner without having remarried, this provision was not implicated upon his death, either in favor of Petitioner or anyone else.[2]

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[2] The only other type of annuity provided by the Plan to participants who were eligible solely for a Deferred Vested

Shortly after Samaroo died, AT&T and/or the MPP paid Robichaud and her daughters by Samaroo nearly $650,000 in benefits. These included payments of $54,000 each to two of Robichaud's daughters in accordance with the "death benefit" provisions of the MPP. Also, as the sole beneficiary of AT&T-sponsored basic and supplemental group life insurance on Samaroo, Robichaud herself was paid more than half-a-million dollars. In accordance with the terms of the Plan, the Plan Administrators determined that no Automatic Survivor Annuity was payable because Samaroo had left no "surviving spouse," and no QDRO designating Petitioner as such for purposes of receipt of the survivor's annuity had been served on the Plan prior to Samaroo's death. Indeed, the MPP never even received a copy of the October 25, 1984 Judgment until well after Samaroo's death.

Approximately eight months after Samaroo's death, on or about May 16, 1988, Robichaud began to assert in various correspondence to the Plan that she should be considered a beneficiary. Citing provisions of ERISA, as amended by REA, she claimed that she was entitled to receive payments from the MPP incident to Samaroo's status as a participant. She did not specify whether she

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Pension was a Deferred Vested Pension Joint and Survivor Annuity. But it applied to participants who had already retired on a Deferred Vested Pension, which Samaroo had not. And, in any event, the eligibility criteria for such an annuity provided: "The surviving annuitant may only be a spouse who is married to the participant on the date as of which the deferred vested pension commenced." Petitioner would thus have been ineligible for this benefit after Samaroo's death even if he had lived to retire.

sought survivor benefits and/or a monthly payment equal to the amount that Samaroo had agreed to pay her in the Property Settlement Agreement (which, of course, was not to be paid by Samaroo until he retired and started receiving his pension), or both.

In response to Robichaud's claims, the MPP again determined that no pension benefits were payable. It so notified Robichaud by letters dated June 23, 1988, October 27, 1988, December 12, 1988, and February 8, 1989. The Plan's position was based on several rationales. First, as of the date of his death, Samaroo had only a vested entitlement to receive a Deferred Vested Pension and not a right to immediate pension payments. Put another way, he might ultimately have become entitled to be paid a Deferred Vested Pension had he reached the requisite age but, at the time of his death, his pension had not yet become payable, even in actuarially reduced form. Because he was eligible only for a Deferred Vested Pension, payments to him could have commenced only when he reached age 65 or, at his election, when he reached age 55 (in an actuarially reduced amount). Second, when Samaroo died at age 53, no QDRO was in effect that directed the MPP to pay pension benefits to an "alternate payee." Third, Samaroo was unmarried at the time of his death and, because there was no QDRO designating Robichaud as a "surviving spouse," the Automatic Survivor Annuity provision was not applicable.

On April 13, 1989, Robichaud filed a motion in New Jersey Superior Court, under the caption of the original matrimonial action, aimed at securing the benefits she sought from the MPP. The motion sought to amend the October 24, 1984 Judgment so as to confer on her the

status that the Plan had denied to her, and to join the MPP as a respondent so that it could be ordered to pay her directly the amount specified in her Judgment.

Because this attempt to secure an order addressed to the MPP to pay benefits directly to Petitioner transformed the state action into a claim to recover benefits under 29 U.S.C. §1132(a)(1)(B), the MPP removed Robichaud's state court action to federal district court on May 16, 1989 and simultaneously filed in federal district court a separate Complaint for Declaratory Relief styled *AT&T Management Pension Plan v. Louise M. Robichaud*, which sought to have the question of Robichaud's entitlement to Plan benefits "clarified," also pursuant to 29 U.S.C. §1132(a)(1)(B). Robichaud moved to dismiss the Plan's declaratory judgment action and to remand the action which she had filed. Pursuant to an opinion dated July 17, 1990, reproduced at Petitioner's Appendix ["Pa"] 24-44, the district court retained jurisdiction over the Plan's declaratory judgment action and those aspects of Robichaud's action which implicated the purported ERISA-based obligation of the Plan to pay her benefits. It remanded the issue of Robichaud's proposed amendment to her Final Judgment of Divorce to the New Jersey Superior Court. It then stayed the federal proceedings pending the completion of the state court action.

After remand, the Plan sought and was granted Intervenor status in the state court action. For almost five and one-half years after the remand, the matter lay dormant in state court, without any documented efforts by Robichaud to expedite it to resolution. Eventually, after a change of venue, the state court action was "reactivated" in December 1995 in a different New Jersey county.

On June 25-26, 1996, a judge in the Family Part of the New Jersey Superior Court, Chancery Division, held a bench trial on that portion of Petitioner's action which had been remanded. No representative of Samaroo's estate, the nominal respondent in the caption of the case, formally appeared. In fact, to the extent the estate was represented at all during the entire proceeding, it was represented by an attorney procured and paid for by Robichaud, who had told the executrix of Samaroo's long-since-closed estate that "*we* would have to hire an attorney in New Jersey" and had asked the executrix, "Would you like me to find someone . . . ?" The executrix had agreed.

Despite the fact that the MPP had been granted Intervenor status, the state family court judge made it clear on the record during the trial that he did not believe the Plan had "standing" to raise any arguments under state and common law as to why the Judgment should not be retroactively amended.[3] In his Statement of Reasons supporting his ruling, the state court judge confirmed that he had not even considered MPP's arguments because he believed the Plan lacked "standing" to raise them; such

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[3] The MPP sought to argue that the "dispute" between Robichaud and Samaroo's estate, which supposedly provided the jurisdictional basis for the state court proceeding, was a sham, because there was never a dispute between Robichaud and the estate. The estate did not have and could not have any interest in survivor annuity pension benefits, inasmuch as there is never a circumstance in which a deceased participant's *estate* has a claim for such benefits, which are paid, if at all, to a surviving spouse. In sum, it was Samaroo's estate, if anyone, that lacked "standing" to litigate before the state court.

arguments, he held, could be raised, if at all, only by Samaroo's estate.

On June 28, 1996, the state court decided, as a matter of "equity," to amend Robichaud's October 25, 1984 Judgment. Petitioner and the opinion and dissent below refer to the Amended Judgment as a retroactive or *nunc pro tunc* order, but the Order actually entered by the state court – which had been drafted by Petitioner, who appeared *pro se* at the bench trial – nowhere uses the term *nunc pro tunc*, nor is it made effective on any date other than the one on which it was entered. Pa124-25. The state court judge, in announcing his reasons for entering the order, highlighted Petitioner's drafting omission by stating that it was his "intent to say" that Petitioner's Judgment was amended "as if it had been entered on January 1, 1985," but he did not modify the wording of the submitted order to conform it to his "intent." Pa115. Rather, the court merely dated the order June 28, 1996 and filed it on the court docket on July 11, 1996.

Nor did the proposed order submitted by Petitioner say anything about survivorship rights, with a view toward designating Petitioner as a "surviving spouse" for purposes of the MPP's Automatic Survivor Annuity. If anything, it muddied the waters by referring to Petitioner's "rights of survivorship to 50% of [Samaroo's] vested pension benefits and to be properly recognized as beneficiary and alternate payee of those rights."

The state court recognized that its order would not have binding effect on the MPP or the district court, which had retained jurisdiction to review any revised state court order to determine whether it was a QDRO

and whether Petitioner had a valid claim for benefits under 29 U.S.C. §1132(a)(1)(B) of ERISA. In announcing his decision, the state court judge stated, "Of course it will be for the federal court to decide whether or not there were any benefits to be left to Ms. Robichaud. . . . " Indeed, Petitioner herself recognized that the federal court was to decide the enforceability issue under ERISA, for she had drafted the order (which the state court entered) to read:

> Any disputes regarding the enforcement of Plaintiff's rights under the Amended Judgment of Divorce shall be submitted to the United States District Court pursuant to the Order entered by the Honorable Garrett E. Brown, U.S.D.J., dated March 27, 1990. [Pa125]

In other words, the state court and Petitioner recognized that it was up to the federal court to decide whether the Amended Judgment was a QDRO or was preempted by ERISA.

In July 1996, Robichaud forwarded the Amended Judgment and a proposed QDRO (Pa126-29 – another document which she had drafted herself) to the Plan. This proposed QDRO, like the Amended Judgment Petitioner had submitted to the state court, referred to "50% of Samaroo's vested pension benefits," which would have been determined as of the date he died, rather than half of the pension to which he might have been entitled as of the 1983 date on which the parties executed the PSA. And, once again, it did not provide that Petitioner was to be deemed a surviving spouse for purposes of receiving the Automatic Survivor Annuity.

On October 10, 1996, the MPP advised Robichaud that her proposed order could not qualify as a QDRO under either ERISA or the terms of the MPP, citing the same rationales it had in denying her initial claim some eight years earlier, and noting that it did not believe that an amended divorce judgment, even if intended to be retroactive 11 years back to the date of the initial Judgment, could create a QDRO, because her ex-husband's death had resulted in a final determination of the benefits he had been due from the Plan.

On June 2, 1997, once again before the district court – now seven years after its initial decision – Robichaud filed a motion for summary judgment or, in the alternative, to dismiss the MPP's Complaint for Declaratory Relief. On August 1, 1997, the MPP filed a cross-motion for summary judgment on its Complaint for Declaratory Relief. On April 21, 1998, the district court denied Robichaud's motion and granted MPP's cross-motion. Pa45-65. Robichaud filed a timely Notice of Appeal with the Third Circuit on May 13, 1998. On September 24, 1999, the Third Circuit affirmed the judgment of the district court. Pa1-22. Robichaud's petition for writ of certiorari to this Court followed on December 22, 1999.

REASONS FOR DENYING THE WRIT

Even if the factually complex and anomalous nature of the case were not sufficient to demonstrate the impropriety of granting certiorari to review the decision below, numerous other, purely legal considerations point to denying the Petition.

I. There Is No Conflict Between Courts of Appeal.

Petitioner argues that certiorari should be granted because there is a conflict between Courts of Appeal. However, her efforts to derive a conflict between the decision below and a "Seventh Circuit decision" (Petition ["P"] 13) border on the frivolous. There is no "Seventh Circuit decision in *Payne*." P28. There is only an unpublished district court opinion entitled *Payne v. GM/UAW Pension Plan*, No. 95-cv-73554DT, 1996 U.S. Dist. LEXIS 7966, 1996 WL 943424 (E.D. Mich. May 7, 1996), which the Third Circuit properly recognized had no precedential value precisely because it was an unpublished district court case. There is thus no need to "resolve the split in authority between the Third and Seventh Circuit," P8, because there is no such split.

In fact, the only circuit court decisions in the vicinity agree with the court below that to preserve the actuarial soundness of ERISA-covered defined benefit pension plans, it is appropriate to determine whether a state court DRO qualifies as a QDRO by reference to a date certain on which the plan participant's eligibility for benefits is locked in place. *See Hopkins v. AT&T Global Info. Solutions Co.*, 105 F.3d 153 (4th Cir. 1997); *Rivers v. Central & Southwest Corp.*, 186 F.3d 681 (5th Cir. 1999) (following *Hopkins*). In *Hopkins and Rivers*, the date certain was the participant's retirement date; here, it was the participant's death. *Hopkins*, *Rivers* and the opinion below correctly concluded that a state court DRO which seeks to reach back into history – to a time before such a date certain – in order to retroactively change operative facts relating to benefit eligibility fails to comply with the mandate of 29 U.S.C. §1056(d)(3)(D), and is therefore not a QDRO.

II. The Issue Presented by Petitioner Is Highly Unlikely to Recur, and Will Definitely Not Recur in New Jersey.

Petitioner is equally far off the mark in asserting that the ruling below will affect a "great number of cases." P26. The ruling below involves an all-but-unique fact pattern: A *pro se* divorcing spouse (who happened to be a matrimonial attorney), through her own negligence, allowed a 1984 divorce judgment to remain unamended for over three years following the enactment of REA.

The passage of over 15 years since REA's effective date has given no hint that a substantial number of other would-be beneficiaries with pre-REA divorce judgments have been unable to convert their divorce judgments to QDROs because the plan-participant-former-spouse died before such an action could be taken. Nor does Petitioner point to any basis for the Court to believe that, during the years REA has been in effect, a "great number" of situations involving post-REA divorce judgments have arisen in which diligent attempts by a divorcing spouse to secure a QDRO have been thwarted by the death of the plan-participant-former-spouse.

Rather, in the 15 years since enactment of REA, only four instances have been uncovered involving litigation over a state court's attempted retroactive modification of a DRO after the death of a pension plan participant, where, as here, the modification would have required the Plan to pay "increased benefits" or a "type or form of benefit not otherwise provided by the plan" in violation of 29 U.S.C. §1056(d)(3)(D)(i) or (ii). They are two federal court cases – the present matter and *Payne* – and two state appellate court rulings that agree with the reasoning

and result below, *Roth v. Roth*, 506 N.W.2d 900 (Mich. Ct. App. 1993), and *Ross v. Ross*, 705 A.2d 784 (N.J. App. Div. 1998).

In *Roth*, like the case now before the Court, the parties' judgment of divorce conveyed an interest to the ex-wife in the pension benefits the husband would receive, but it required the husband and not the pension plan to pay the ex-wife, and payments were to be made only for so long as the husband received such benefits. It too, was silent as to survivorship rights. When the ex-husband died before drawing any pension benefits, his former wife seized the opportunity to try to retroactively amend the divorce decree to award herself the survivorship rights which otherwise would have lapsed. The Michigan court, applying state law and ERISA, refused to grant the ex-wife's petition to modify the divorce judgment so as to enter a posthumous QDRO.

In *Ross*, decided shortly after the New Jersey family court had entered its Order in this case and immediately prior to the decision rendered below by the district court, a divorce judgment which had never been reduced to a QDRO provided that a plan participant's ex-wife was to be deemed the surviving spouse for purposes of benefits under his various pension plans. Shortly after the divorce, the ex-husband remarried, and a short while later, he died. His pension plans all provided that the beneficiary of any survivorship payments would be his spouse unless the spouse had agreed otherwise in writing. After his death, his ex-wife sought to have her divorce judgment retroactively converted to a QDRO so that she could receive the survivorship payments. She argued that even though she was seeking this action after

her ex-husband's death, the court could grant the requested relief because "ERISA does not require the entry of QDROs prior to the time that a participant dies or remarries." 705 A.2d at 796. The state appellate court responded: "We disagree. . . . New Jersey's concepts of equity cannot be applied and a QDRO cannot be entered after the fact." *Id.* at 797.

No other case presenting a similar fact pattern has apparently reached the state or federal judiciary in all the years since QDROs became possible. Petitioner certainly does not cite any. With four known cases in 15 years, it can hardly be said that a "great number" of cases like Petitioner's have arisen.[4] Nor can it be said with any

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[4] Although the author of the dissent below apparently believed the majority ruling would necessarily have a broad impact, stating that the upshot of the ruling would be that "a state court's power to enter or modify a [QDRO] with respect to a participant's interest in a pension plan ends with the participant's death," and that she was "unable to conceive of circumstances in which, under the majority's reasoning, a meaningful alteration of a QDRO could be effected post-death," Pa15, the majority expressly disclaimed such a broad ruling. Pa14-15 n.1. The dissenter elsewhere acknowledged that what had been "expressly foreclosed" was only a "post-death modification of a QDRO which requires 'increased benefits.' " There are, of course, numerous circumstances in which a post-death QDRO would merely allocate a pension benefit so as not to implicate 29 U.S.C. §1056(d)(3)(D). For example, the district court opinion below identified an entire class of pension plans in pervasive use throughout the country – those utilizing individual accounts (such as 401k plans) – in which the entry of a QDRO after a plan participant's death would not require a plan to pay increased benefits. Pa52. In such plans, a fixed amount is held on behalf of the participant, and the only issue in entering a posthumous QDRO would be the identity of the

degree of certainty that the issue raised by Petitioner will affect anyone other than Petitioner herself. On the other hand, it can be said with certainty that because New Jersey family courts are now barred by *Ross* from issuing the type of retroactive amendment of a divorce judgment that was entered in the matter below, a similar dispute will never recur in New Jersey.

Nor is there any reason to credit Petitioner's assertion that federal courts will be subjected to "an explosion of domestic relations litigation." The normal course for a divorcing spouse who secures a DRO from a state court is to present it to the pension plan administrator, who is to make a determination whether it qualifies as a QDRO. If the plan administrator accepts the DRO as a QDRO, there will be no need for litigation. If it does not, then the dissatisfied ex-spouse has the option of filing a claim for benefits against the plan under 29 U.S.C. §1132(a)(1)(B). Such a suit may be brought in either state or federal court. 29 U.S.C. §1132(e)(1). While the defendant will have the option to remove the matter to federal court because the claim is based on a federal statute, there is no basis for Petitioner's opinion that litigants will overwhelmingly select a federal forum for these cases. *See, e.g., Roth v. Roth; Ross v. Ross.* And in any event, what would be presented would not be "domestic relations litigation" but ERISA-based claims for benefits, in which the key issue arises under federal law: Does the state court DRO qualify as a QDRO under the provisions of ERISA?

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proper beneficiary or beneficiaries and how the amount being held would be split, not whether benefits should be paid at all.

Another reason why Petitioner's "explosion of domestic relations litigation" in federal courts (P28) is unlikely is that in the limited number of cases in which a party might have delayed attempting to secure a QDRO for as long as Petitioner and is then precluded from doing so because of the death of the plan-participant-ex-spouse, that party will not be left without a remedy but will be able to proceed against his or her counsel for malpractice to recover the value of any lost benefits.[5] *See, e.g., Meyer v. Wagner*, 709 A.2d 784 (Mass. 1999) (authorizing malpractice claim against attorney for allegedly improperly preparing property settlement agreement and failing to initiate ancillary proceedings to secure assets); *Ziegelheim v. Apollo*, 607 A.2d 1298 (N.J. 1992) (permitting malpractice suit against matrimonial attorney whom client contended had been negligent in not negotiating and drafting a better property settlement on her behalf); *Williams v. Cooch & Taylor*, No. 92C-03-024, 1994 Del. Super. LEXIS 211 (Del. Super. Ct. May 11, 1994) (permitting malpractice claim arising from attorney's failure to perfect QDRO).

III. Ambiguities in the Record Below Render This an Inappropriate Vehicle for the Court to Address the Issue Put Forward by Petitioner.

A number of anomalies in the factual record from the state court proceeding render this case inappropriate for certiorari. As the state court judge noted, the draft of the

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[5] The uniqueness of Petitioner's situation is again highlighted here, for she represented herself and therefore could not claim against her malpractice policy.

Amended Judgment submitted to the court was prepared by Petitioner herself. *See* Pa115. Although she was urging the state court to enter an amendment of her Judgment as a retroactive *nunc pro tunc* order, she did not include such language in the draft she submitted and did not specify any particular retroactive date on which she wanted the order to be effective. *Id.*; Pa124-25. In explaining his reasons for entering the Amended Judgment, the state court judge articulated an "intent" to amend the original Judgment "as if it had been entered on January 1, 1985." Pa 115. However, for unstated reasons, he took no action to modify the language that Petitioner had submitted so that it would read as he "intended." Thus, the DRO at issue in this case bears a date of June 26, 1996, was filed on the state court docket on July 11, 1996, and nowhere states that it is to be deemed retroactive to any date, let alone January 1, 1985.[6]

Even if the Amended Judgment had specified that it *was* being entered *nunc pro tunc* to January 1, 1985, this would raise other issues as to the appropriateness of using this case as a vehicle for addressing the interplay between state court DROs which purport to be retroactive to a point in time prior to a plan participant's death and the requirements of 29 U.S.C. §1056(d)(3)(D). This is so because different jurisdictions have different rules as to

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[6] Under New Jersey law, the actual order entered by the state court, and not any purpose or "intent" stated by the court when announcing its opinion, controls and is the operative judicial "ruling." *Hesser v. Harleysville-Garden State Ins. Co.*, 670 A.2d 123, 126 (N.J. App. Div. 1996); *MacFadden v. MacFadden*, 139 A.2d 774, 776 (N.J. App. Div.), *certif. denied*, 141 A.2d 828 (N.J. 1958).

the circumstances under which *nunc pro tunc* orders may be entered. The general rule that *nunc pro tunc* orders may not affect a party's substantive rights but are to be confined to merely correcting an error committed by the court which entered the original order would foreclose entry of the type of substantive-right-affecting state court order issued here. *See* 56 Am. Jur. 2d, *Motions, Rules & Orders* §44 at 37-38:

> The function of an order *nunc pro tunc* is to record an order actually made, which, through some oversight or inadvertence, was never entered on the records of the court, or which was incorrectly entered. An order *nunc pro tunc* cannot do more than supply a record of something that was actually done at the time to which it is retroactive. . . . A *nunc pro tunc* amendment or correction of a court order is not proper to correct judicial errors or omissions or to change an order actually entered. If the court has omitted to make an order that it might or ought to have made at a particular term, it cannot make the order *nunc pro tunc* after the term or at a subsequent term.

See also Matthies v. Railroad Retirement Bd., 341 F.2d 243 (8th Cir. 1965) (*nunc pro tunc* order "may not be used for the purpose of wiping out a judgment previously entered by [the court] affecting the rights of a party thereto"); *Emmons v. Stillwell*, 156 A.2d 54, 56 (N.J. Law Div. 1959) (" '*[N]unc pro tunc*' is a phrase used to express that a thing is done at one time which ought to have been performed at another. . . . It can never be invoked to change a legal status."). In New Jersey, after *Ross*, this is now the rule, though the Michigan authorities appear split. *Compare Payne with Roth v. Roth.*

Furthermore, although one of the items of relief Petitioner seems to believe she secured in the Amended Judgment was her designation as Samaroo's "surviving spouse" for purposes of receiving the Automatic Survivor's Annuity provided under the MPP, *see* P6-7, neither the Amended Judgment entered by the state court, nor the proposed Domestic Relations Order drafted by Petitioner, in fact designates her as a "surviving spouse" for that purpose. All that is ordered is that Petitioner be awarded "rights of survivorship to 50% of [Samaroo's] vested pension benefits, and to be properly recognized as beneficiary and alternate payee of those rights." Pa125. This, like Petitioner's original Judgment, refers to a division of the monthly pension benefit payments Samaroo might have received if he had lived to collect them, and not to a survivor's annuity, which requires different language in a DRO. *See Hopkins*, 105 F.3d at 755 (distinguishing between DRO ordering division of monthly pension benefits and DRO ordering former spouse to be considered a "surviving spouse" for purposes of survivor's annuity); S. Rep. No. 575 (1984) at 20-21 ("If the participant dies before [attaining the earliest retirement age under the applicable pension plan], the alternate payee is entitled to benefits only if the qualified domestic relations order requires survivor benefits to be paid.")

These deficiencies in the Amended Judgment and the proposed DRO submitted to the MPP for qualification as a QDRO, both of which were drafted by Petitioner, further point to the inappropriateness of granting certiorari in this case.

IV. The Third Circuit Correctly Concluded that Petitioner's Amended Domestic Relations Order Is Not a QDRO.

The opinion below cut to the heart of the matter by focusing on whether Petitioner's Amended Judgment complies with 29 U.S.C. §1056(d)(3)(D)(ii). Regardless of the status of the Amended Judgment under state law, if the Amended Judgment requires the MPP to "provide increased benefits," then it is *not* a QDRO, is preempted by ERISA, *see id.* §1144(b)(7), and is unenforceable against the Plan. These key determinations are to be made under the federal law of ERISA and not pursuant to any state law or court order, as the New Jersey judge clearly recognized. In explaining his decision, he went to some length to make it clear that he was not purporting to rule on issues arising under ERISA, which were for the federal court to decide:

> . . . I am aware of the fact that it is the position of AT&T that under the plan at the time, because – at the time of the divorce, that he could not have elected to name Ms. Robichaud as a recipient of the survivor benefit. But this issue is for the federal court, not the state court to decide. [Pa121-22]
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> * * *
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> Of course, it will be for the federal court to decide whether or not there were any benefits to be left to Ms. Robichaud. [Pa122-23]
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> * * *

> I conclude that a court of equity can enter such a judgment when it's in the interest of justice to do so. I conclude that I have the authority to do so. Of course, that does not decide the issue of what weight Judge Brown or his successor Judge in the United States District Court will give to my determination. Clearly by adding those words and seeking to at this time give effect to my decision now retroactive to January 1, 1985 when the Retirement Equity Act took effect will be for Judge Brown to determine. [Pa114-15]

Thus, the state court understood that in the procedural posture of this case, it was adjudicating only questions of state domestic relations law and that the federal court would determine the relevant question of federal law: Whether the state court's Amended Judgment was a QDRO.

The state court's observations above accurately reflect the language of ERISA as amended by REA. 29 U.S.C. §1144(a) provides that "[e]xcept as provided in subsection (b) of this section," ERISA "supersedes" (i.e., preempts) "any and all State laws. . . . " State laws include "decisions" of state courts, 29 U.S.C. §1144(a)(1), as is recognized in 29 U.S.C. §1144(b)(7) which was added by REA and provides that the preemption provision of subsection (a) is inapplicable only to *qualified* domestic relations orders. *See also Unum Life Ins. Co. v. Ward*, 526 U.S. 358, 119 S. Ct. 1380, 1386 n.1 (1999). Thus, the pertinent question – which the Petitioner and the dissent below fail to grasp – is not whether the courts below failed to give full faith and credit to the purported *nunc pro tunc* provision of the state court Order amending the 1984 Judgment, but whether the Order is a QDRO or not;

if not, it is preempted by ERISA. *See Boggs v. Boggs*, 520 U.S. 833, 852-54 (1997) (emphasizing primacy of ERISA's QDRO provisions over state community property law); *cf. Drye v. United States*, ___ U.S. ___, 120 S.Ct. 474, 479, 481 (1999) (holding that although state law applies to general effect of beneficiary's disclaimer of inheritance, "ultimate issue" as to federal taxability is controlled by federal, not state, law).

The courts below appropriately focused first on what the MPP was obligated to pay incident to Samaroo's participation in the Plan on the real date of his death in September 1987. At that time, *no one* had survivor annuity rights related to Samaroo's participation because Samaroo was not married and no QDRO existed designating Petitioner as his surviving spouse. Even Samaroo's right to receive pension payments had not yet accrued; as of his death, he had only an entitlement to receive Deferred Vested Pension payments at some later date, upon his retirement in accordance with the Plan. And, since no QDRO had been entered prior to Samaroo's death that assigned all or a portion of his vested-but-not-yet-payable pension benefits to an alternate payee, the MPP did not owe any pension payments to anyone with respect to Samaroo's participation in the Plan. Put simply, at the time of Samaroo's death, the Plan's obligations to him or to any possible beneficiary with respect to him were zero. Therefore, any order thereafter requiring *any* sum to be paid to anyone with respect to Samaroo necessarily would require the MPP to pay increased benefits and/or a type or form of benefit not otherwise provided by the Plan.

The Third Circuit majority explained why it is important to focus on the date of Samaroo's death as the point in time at which his entitlement to benefits from the Plan was determined. It analyzed how the nature of a defined benefit pension plan requires that its liabilities be ascertainable as of particular and identifiable dates. The other courts of appeals which have addressed an analogous issue – the Fourth Circuit in *Hopkins* and the Fifth in *Rivers* (which followed *Hopkins*) – have concluded similarly that because of defined benefit pension plans' characteristics, it is essential in enforcing ERISA that a plan's obligations to participants be fixed as of certain dates. In *Rivers* and *Hopkins*, the courts ruled that the date for locking in a plan's obligations to a participant and to any of his beneficiaries was the date that a participant retired and commenced receiving benefits. In this case, the Third Circuit correctly ruled that the latest ascertainable date for determining a participant's entitlements from the MPP was the date of his death. Utilizing such dates certain to determine a pension plan's liabilities is required because the necessary "actuarial calculations . . . would be rendered invalid if participants were allowed to change the operative facts retroactively." Pa10.

Yet such a retroactive re-writing of immutable history is the essence of what Petitioner has been trying for 11 years to persuade a court to do for her. The dissent below would open the door wide for state courts to do likewise. Before the state court judge, Petitioner invoked the doctrine of "unjust enrichment" to argue that it was not right to permit the MPP to "keep" the money that her deceased ex-husband could, during his lifetime, have arranged for her to receive. She told the state court that it should grant

the relief she sought because if she did not get the money, no one would, and it would be wrongly left in the MPP pension trust. While this obviously had a persuasive tug on the state court in this case and the district court in *Payne*, the Seventh Circuit explained in *Cummings v. Briggs & Stratton Retirement Plan*, 797 F.2d 383, 389 (7th Cir.), *cert. denied*, 479 U.S. 1008 (1986), why it is inappropriate in analyzing a defined benefit pension plan: "The doctrine of 'unjust enrichment' . . . does not make sense in this context of actuarial planning. A pension plan is not unjustly enriched where a pensioner dies early with no benefits payable to his survivor." *See also Ryan v. Federal Express Corp.*, 78 F.3d 123, 127-28 (3d Cir. 1996) (holding "unjust enrichment" doctrine not applicable to ERISA plan where plan provisions specify the result said to be "unjust").

As noted by the Third Circuit below, what happened here was not "unjust enrichment," but the normal operation of a defined benefit pension plan. The fact that no benefits were payable to anyone with respect to Samaroo's participation in the MPP is a natural consequence of the insurance-policy-like nature of defined benefit pension plans. Some participants will die before they ever collect a dollar of their pension and associated benefits, while others will live much longer than average and collect more than might have been forecast. When Samaroo died without ever agreeing to convert his divorce Judgment from one requiring him to pay money to Petitioner if and when he received a pension, to a QDRO (which could have been fashioned to ensure payments directly to Petitioner regardless of whether Samaroo pre-deceased her), he and Petitioner simply

became part of the statistics upon which the Plan – and all defined benefit pension plans – must depend to continue to exist. By operation of fate and the terms of the Plan, neither Samaroo nor his ex-wife was entitled to collect anything from the Plan. The Amended Judgment, despite its ambiguities, purports to compel the Plan to pay something to Petitioner with respect to Samaroo's participation in the Plan. By so doing, as the Third Circuit correctly held, it requires the payment of increased benefits, is not a QDRO in light of 29 U.S.C. §1056(d)(3)(D)(ii), and is preempted by ERISA. The Third Circuit correctly applied the plain language of REA to hold that:

> A domestic decree that would have the effect of increasing the liability of the Plan over what has been provided in the Plan (read in light of federal law) is not a QDRO, no matter what the decree's status under state law. . . . [A] decree conferring survivor's benefits to Robichaud after those benefits have lapsed would provide increased benefits and therefore cannot be a QDRO. [Pa10]

CONCLUSION

The Third Circuit correctly applied ERISA to hold that Petitioner's state domestic relations order did not meet the requirements to qualify as a QDRO. There is no valid reason for this Court to exercise its jurisdiction, and therefore the petition for certiorari should be denied.

Respectfully submitted,

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